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No. 230

In the Supreme Court of the United States

OCTOBER TERM, 1951

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement:	
The proceedings below	3
Concrete block machines, their uses and development	5
Major aspects of illegal acts and practices found by district court	8
Besser's elimination of competitors, other than Stearns	10
The 1942 three-party patent licensing agreement and restraints effected thereunder	15
Besser's acquisition of control of Stearns	22
Besser's purported sale of Stearns stock after institution of present suit	26
Summary of argument	31
Argument:	
Introduction	35
I. Appellants have monopolized interstate commerce in concrete block machines, in violation of Section 2 of the Sherman Act	37
II. Appellants combined and conspired with the non-appealing defendants to restrain trade and commerce, in violation of Section 1 of the Act	42
A. The 1942 license agreement	42
B. Harassment of competitors under color of assertion of patent rights	53
III. The relief ordered by the district court is appropriate and necessary	58
A. Divestiture of stock and prohibition against future acquisitions	61
B. Provision granting Besser's present lessees the option to purchase leased machines	64
C. Patent provisions:	
1. Cancellation of the 1942 license agreement and prohibition against similar agreements	71
2. Compulsory licensing of patents	73
3. The licensing procedure	77

998118—52——1

Argument—Continued
III. The relief ordered by the district court—Continued Page
D. Miscellaneous provisions:
1. Application of the judgment to "successors" and "assigns" 82
2. Prohibition against contracts restraining others from competing 83
3. Absence of any adjudication of validity .. 84
Conclusion 86

CITATIONS

Cases:
American Tobacco Co. v. *United States*, 328 U. S. 781 ..... 32, 37, 41, 83
Addystone Pipe & Steel Co. v. *United States*, 175 U. S. 211 .. 83
Andrus v. *Whitman*, 93 F. Supp. 383 54
Apex Hosiery Co. v. *Leader*, 310 U. S. 469 68
Besser Mfg. Co. v. *Whitman*, 92 U. S. P. Q. 291 79
Hartford-Empire Co. v. *United States*, 323 U. S. 386 ..... 69, 70, 72, 73, 83
International Salt Co. v. *United States*, 332 U. S. 392 ... 34, 59, 69
National Harrow Co. v. *Hench*, 83 Fed. 36 44
Patterson v. *United States*, 222 Fed. 599, certiorari denied, 238 U. S. 635 57
Picard v. *United Aircraft Co.*, 128 F. 2d 632 57
Pope Mfg. Co. v. *Gormully*, 144 U. S. 224 52
Ramsay Co. v. *Bill Posters Assn.*, 260 U. S. 501 68
Regal Knitwear Co. v. *Labor Board*, 324 U. S. 9 82
Schine Chain Theatres v. *United States*, 334 U. S. 110 58
Standard Oil Co. v. *United States*, 283 U. S. 163 ..... 44, 50
Standard Oil Co. v. *United States*, 337 U. S. 293 36
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20 .. 48
Stewart-Warner Corp. v. *Staley*, 42 F. Supp. 140 57
Swift & Co. v. *United States*, 196 U. S. 375 37
United States v. *American Can Co.*, 87 F. Supp. 18 40
United States v. *American Optical Co.*, CCH Trade Reg. Serv. Par. 62308 80
United States v. *Automatic Sprinkler Co.*, CCH Trade Reg. Serv. Par. 62230 80
United States v. *Crescent Amusement Co.*, 323 U. S. 173 .. 59, 61, 71, 72
United States v. *Gamewell Co.*, CCH Trade Reg. Serv. Par. 62236 80
United States v. *General Cable Corp.*, CCH Trade Reg. Serv. Par. 62309 80
United States v. *General Instrument Corp.*, 87 F. Supp. 457 .. 49
United States v. *Great Lakes Towing Co.*, 1 Decrees and Judgments in Federal Antitrust Cases 253 82

Cases—Continued Page

United States v. *Hartford Empire Co.*, 46 F. Supp. 541, affirmed 323 U. S. 386 58
United States v. *Libbey-Owens-Ford Glass Co.*, CCH Trade Reg. Serv. Par. 62323 80
United States v. *Line Material Co.*, 333 U. S. 287 ..... 50, 51
United States v. *Masonite Corp.*, 316 U. S. 265 44
United States v. *National Lead Co.*, 63 F. Supp. 513, affirmed, 332 U. S. 319 48
United States v. *National Lead Co.*, 332 U. S. 319 ..... 70, 73–74, 76, 84
United States v. *Owens-Corning Fiberglas Corp.*, CCH Trade Reg. Serv. Par. 62442 80
United States v. *Paramount Pictures, Inc.*, 334 U. S. 131 38
United States v. *Patten*, 226 U. S. 525 52
United States v. *Pullman Co.* 55 F. Supp. 985 82
United States v. *Standard Oil Co.*, 221 U. S. 1 ..... 11, 59
United States v. *Technicolor, Inc.*, CCH Trade Reg. Serv. Par. 62580 80
United States v. *Union Pacific R. R. Co.*, 226 U. S. 61 61
United States v. *United States Gypsum Co.*, 340 U. S. 76 ..... 59, 60, 68, 71, 74, 75, 79–80, 85–86
United States v. *United States Gypsum Co.*, 333 U. S. 364 ..... 40, 74
United States v. *Vehicular Parking, Ltd.*, 56 F. Supp. 297 82
United States v. *Women's Sportswear Assn.*, 336 U. S. 460 68
Whitman v. *Andrus*, 92 U. S. P. Q. 291 ..... 18, 50, 55, 56, 85

Statutes:

Sherman Act, Act of July 2, 1890, as amended, 26 Stat. 209, 15 U. S. C. 1 *et seq.*:
Sec. 1 2
Sec. 2 2
Sec. 4 2

Miscellaneous:

Federal Rules of Civil Procedure, Rule 65 (d) 82
Monograph No. 21, "Investigation of Concentration of Economic Power," TNEC (76th Cong., 3d Sess., p. 115) 40
Dept. of Commerce Report (Census of Manufacturers) to House of Rep. Sub-Comm. on Study of Monopoly Power (Celler Comm.), dated Dec 1, 1949 40

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OPINION BELOW

The opinion of the district court (R. 1011) is reported in 96 F. Supp. 304.

JURISDICTION

The final judgment of the district court was entered on April 12, 1951 (R. 1063). The petition for appeal was filed and allowed on June 6, 1951 (R. 1147–8). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 832, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. This Court noted probable

jurisdiction of the appeal on October 8, 1951 (R. 1178).

QUESTIONS PRESENTED

1. Whether the district court erred in finding and concluding that appellants unlawfully monopolized interstate commerce in concrete block machines, and that they combined and conspired with the other defendants to restrain such commerce.

2. Whether certain provisions of the judgment should be set aside.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. [15 U. S. C. 1.]
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 2.]
>
> * * * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with

jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

THE PROCEEDINGS BELOW

This is a civil action brought by the United States under Section 4 of the Sherman Act charging the defendants with conspiring to restrain and to monopolize interstate commerce in concrete block machines, in violation of Sections 1 and 2 of the Act, and charging two of the defendants (the present appellants) with monopolizing and attempting to monopolize such commerce, in violation of Section 2 of the Act.

The complaint, which was filed in April 1949, named as defendants Besser Manufacturing Company, the principal domestic producer of concrete block machines;[1] Stearns Manufacturing Company, the second largest producer of such machines;[2] Jesse H. Besser, for many years president of Besser Manufacturing Company and owner of 99% of its stock (Ex. 4, R. 1184–5); and Louis Gelbman and Hamlin F. Andrus,

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[1] R. 884, 1013–4; Ex. 3, R. 1181, 1183; Ex. 188, R. 1402.

[2] R. 884, 1013–14; Ex. 188, R. 1402.

co-owners of certain patents relating to concrete block machines (R. 4, 13). The corporate defendants will be referred to, respectively, as Besser and Stearns, and the Gelbman and Andrus patents will be referred to as the Gelbman patents.[3] Only defendants Besser and Jesse H. Besser have appealed from the judgment entered below.

The district court, after a trial extending from May 16 to June 23, 1950 (R. 1063), rendered an opinion on January 30, 1951, holding that the defendants had violated Sections 1 and 2 of the Sherman Act, as charged in the Government's complaint (R. 1011–28). The court, after hearings on relief, entered final judgment against the defendants on April 12, 1951 (R. 1063). In this judgment, the court adopted the opinion which it had filed as its conclusions of law and findings of fact (*ibid.*).

The court's final judgment requires appellants to divest themselves of their stockholdings in Stearns, and it prohibits them from acquiring assets or securities of any company engaged in making or selling concrete block machines except upon a showing to the court that the acquisition would not substantially lessen competition in the manufacture or sale of these machines (R. 1064–5). The judgment cancels the existing three-

[3] Andrus is in semi-retirement (R. 872) and Gelbman was the active party of the co-owners in dealings involving their patents (R. 855–6).

party license agreement between Andrus and Gelbman, Besser, and Stearns; prohibits the making of any similar agreement; and bars infringement suits[4] and threats thereof based on acts of infringement occurring prior to the date of the court's judgment (R. 1065–6). Appellants and Andrus and Gelbman are each required to license at a reasonable rate of royalty any patent relating to concrete block machines now owned or controlled by them, or acquired within ten years of the date of judgment (R. 1066–7). Besser is required to grant each present lessee of its concrete block machines an option to terminate the lease, to continue it, or to purchase the leased machines (R. 1068). Finally, each defendant is enjoined from making or enforcing any agreement to prevent a person from competing with the defendants in the development, manufacture or sale of concrete block machines, and from coercing any person to refrain from manufacturing such machines (R. 1068).

CONCRETE BLOCK MACHINES, THEIR USES AND DEVELOPMENT

Concrete block machines are machines used to form and compress a concrete mixture into molded units, commonly called "concrete" or "cinder" blocks, which are used extensively in

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[4] Three related proceedings then pending on appeal were excepted from the prohibition.

the construction of residential, farm and commercial structures (R. 4, 18). These blocks have become increasingly popular and important during the past decade, and particularly since the end of World War II, due to improvements in their style, attractiveness, efficiency and stability and shortages in other construction materials (R. 1019).

When Besser entered the industry in 1904, concrete block machines were hand-operated and could produce 150 blocks per day, whereas Besser now has a machine capable of producing over 6,000 standard-sized blocks in an 8-hour day (R. 1012). In 1909, the original method of packing and compressing the mixture into the mold by hand was replaced by a "power tamper," which trebled productive capacity (R. 893). The next major improvement occurred in 1924 when appellants introduced their plain pallet[5] stripper machine, patented in 1929, which greatly reduced operating costs and had the relatively high productive capacity of 3600 blocks per 8-hour day (R. 895-6; Ex. 180, R. 1391). The plain pallet machine had greater productive capacity than the cored pallet machines then in use because it permitted more rapid and satisfactory ejection of blocks from the mold (R. 326, 730, 895), and it

[5] A pallet is a bed, usually made of metal, upon which the mixture rests during the forming and curing of the block. Pallets are generally either of the plain or the cored type.

cost less to operate because a single pallet could be used in making blocks of various sizes, whereas with a cored pallet a separate pallet is needed for each size of block (R. 730; Ex. 3, R. 1182).[6]

Prior to 1939 concrete had been pounded into the mold by tamping, but in that year machines were developed for packing the concrete in the mold by vibrating the mold (R. 58–61, 910–1). The earlier method caused greater wear and tear (R. 911–2), and the newer machines, using the principle of vibration plus application of pressure to the top of the block, produced "a block more uniformly packed from bottom to top and of accurate height, with a smooth top, and permitted faster operation" (R. 926; see also R. 61–2, 925–7). Besser, which had turned to production of vibrating machines in 1939 (R. 910), stopped making tamping machines in 1943 because their sales had "dwindled down to almost nothing" (Ex. 7, R. 1187).[7] In recent years various other manufacturers have likewise manufactured only vibrating machines (R. 116, 169–70, 383, 505). The ex-

[6] In 1947 Besser, in setting forth reasons why a block maker should use its latest machine, stated that a block maker required a $30,000 investment in cored pallets to obtain production equal to that provided by a $6,000 investment in Besser's plain pallets (Ex. 3, R. 1182).

[7] Besser's general sales manager reported in March 1943: "Due to the almost complete changeover and demand by the trade, we have found that it is no longer profitable for us to continue the manufacture of the Champion Tamper" (Ex. 7, R. 1187).

tent to which these machines dominate the market is shown by the fact that sales of such machines constituted 79.6% of total dollar industry sales in 1946; 83.6% of such sales in 1947, and 91.8% of such sales in 1948 (R. 1013).

MAJOR ASPECTS OF ILLEGAL ACTS AND PRACTICES FOUND BY DISTRICT COURT

Before setting forth the detailed findings and supporting evidence relating to appellants' illegal acts and practices, we think it may be helpful to outline the major aspects of the conduct which the district court adjudged illegal.

Besser now dominates the concrete block machine industry (R. 1015, 1023), and in the course of achieving this position of dominance it has absorbed several major competitors or otherwise restricted their competition (R. 1017–20, 1023–4). The culmination of this course of conduct came in 1946 and 1948 when Besser secretly purchased a controlling block of the stock of Stearns, Besser's only really important competitor (R. 1013–4, 1022–3). These secret stock purchases were made after Besser's president had learned that Stearns planned to manufacture a plain pallet concrete block machine following the expiration in 1946 of Besser's plain pallet patent (R. 1022).[8]

Misuse of rights claimed under patents also played a vital role in Besser's march to dom-

[8] As to the advantages of plain pallet machines, see, *supra*, pp. 6–7.

inance. The crux of this aspect of the case is the 1942 contract under which the Gelbman patents relating to vibrating concrete block machines were licensed to Besser and Stearns (R. 1020).[9] This contract prohibited the patentees from licensing others without the joint consent of Besser and Stearns, and thus "virtually made it impossible for others to obtain rights under those patents" (R. 1021). As the district court said, the "two giants of the industry" were thereby given "the power to restrict competition—present and future" (R. 1020–1). Besser and Stearns utilized this power to wage a vigorous and successful terroristic campaign and, by threats of costly patent infringement suits, drove out of the concrete block machine business many of the "little fellows" of the industry (R. 1023–5).

In the fall of 1947 Besser took a further long step forward toward "realization of a complete monopoly," by inaugurating the policy of leasing and not selling (except for export) its best and most efficient machine (R. 1025; *infra*, pp. 65–67).

Subsequent to the filing of the present action, Jesse H. Besser entered into an agreement to sell his stockholdings in Stearns to a third person (R. 1026). Not only is it doubtful that this was a bona fide sale to an independent purchaser, but, of

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[9] Vibrating machines are recognized in the industry as far superior to the tamping machines previously employed (*supra*, pp. 7–8).

greater significance, the terms of the agreement were such that there were "many possibilities" that the Stearns stock would revert to the seller, and important limitations were placed upon Stearns' activities (and therefore its competition with Besser) (R. 1027). The district court said of this transaction: "To this court it is a practical admission that Besser * * * is seeking to superficially cleanse itself of all taint of monopoly while retaining all its benefits" (*ibid.*).

We now proceed to a more detailed statement of the district court's findings and of some of the evidence supporting or supplementing these findings.

BESSER'S ELIMINATION OF COMPETITORS OTHER THAN STEARNS

In 1929 Consolidated Concrete Machinery Corp. was Besser's chief competitor and running it a close race in dollar volume of sales (R. 1017). In 1931 Besser acquired a large majority of Consolidated's stock, installed four out of seven directors, removed the company's machinery, shut down its plant, and dissolved the corporation (R. 79–82, 1018). As a result, the company, which was then first in the industry in number of machines sold (R. 71), was permanently eliminated as a competitor. And in 1935 Besser purchased all machines, patents, customer lists, etc., relating to concrete block machines owned by Industrial Brownhoist Corporation (Ex. 8, R. 1189). Al-

though the district court did not view these acquisitions as being evidence of monopolization or attempted monopolization (R. 1018),[10] they are pertinent as showing a continuing pattern of conduct, fully established by appellants' later acts. Cf. *United States* v. *Standard Oil Co.*, 221 U. S. 1, 46–47.

In 1938 Besser entered into an agreement with Stephen Flam of California, an inventor and manufacturer of concrete block machines, granting Besser an exclusive license under the Flam patents, except for Flam's retention of the right to manufacture and sell in nine far western states (R. 1019; Ex. 9. R. 1192–3).[11] Any improvements relating to the licensed devices or machinery developed by either party were to be licensed to the other (*id.*, 1198).[12]

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[10] The court's holding as to Consolidated was based upon the ground that the company was in serious financial difficulties and was acquired during the depression of the early 1930's (R. 1017–8). The grounds for the holding as to Brownhoist were that its concrete block machine business was only a minor part of its total business and that the machine business was about to be moved to a location near Besser where it "could be a thorn in Besser's side right in its own backyard" (R. 1018).

[11] The provision for allocating territory was specifically made applicable to machines equipped with devices of a vibrating type "other than as disclosed and claimed in" the patents licensed by Flam (Ex. 9, R. 1194).

[12] The license was to continue to the latest expiration date of any licensed patent unless Besser terminated at the end of three years or at the end of six years, and the licensor could terminate the license if Besser breached its agreement or became bankrupt (Ex. 9, R. 1198–9).

In 1946, when Stephen Flam's company, Stephen Flam, Inc., was the fourth in the industry in dollar sales, Besser absorbed the company by acquiring all of its assets (R. 1019–20; Exs. 27–29, R. 1235–49).[13] By an agreement made at the same time with Stephen Flam, Besser employed him for a five-year period as a consultant in developing concrete block machinery,[14] and acquired his patents relating to such machinery and all rights with respect to any invention made by him during his employment by Besser (Ex. 26, R. 1229–32). In addition, Flam covenanted that he would not, except in connection with Besser, engage in the concrete block machinery business for a period of eight years beginning January 1, 1947 (*id.*, R. 1234). For these various acquisitions, Besser paid $385,000 (R. 1019).

In December 1948 Besser entered into a contract with Bernard Flam, son of Stephen Flam (R. 1023), which recited that Bernard Flam had filed an application for a patent relating to concrete block machinery and was about to file other like applications (Ex. 99, R. 1296–7). The con-

[13] The company also agreed that it would not engage in the concrete block machinery business in the State of California so long as Besser carried on a like business in that state (Ex. 28, R. 1240).

[14] For Flam's services as a consultant, he was to be paid $6,000 a year, but was not to be required to give such services for more than three months in any year, or east of the Rocky Mountains, or if his physical condition did not permit (Ex. 26, R. 1232–3).

tract provided that Besser would pay Bernard Flam $65,000, and that the latter would grant Besser an exclusive license for the life of any patent issued on the pending and contemplated patent applications, and would grant Besser first option to acquire exclusive rights under any patent issued on any invention made by Bernard Flam prior to April 1, 1954 (*id.*, 1297–8). The contract further prohibited Bernard Flam from engaging in the concrete block machinery business prior to April 1, 1959 (*id.*, R. 1299).

Appellants made a similar, although unsuccessful, attempt to eliminate Lith-I-Bar, the third company in the industry in dollar sales (R. 1014).[15] The district court found that Besser tried to buy Lith-I-Bar, that Besser "considered it imperative that the Lith-I-Bar Company be out of business," and that Besser had offered to employ Milewski, Lith-I-Bar's president (R. 383), under an arrangement similar to the one which Besser had made with Stephen Flam (R. 1023).[16] Milewski testified that a Besser representative told him that if Lith-I-Bar would stop production at the end of six months or a year, Besser would put Milewski on its payroll for a 10-year period and he "would not have to do

[15] Lith-I-Bar had, however, only 7.8% of the industry's 1948 dollar sales, as against 65% for Besser and Stearns combined (R. 1013–4).

[16] Appellants have not assigned error to these findings.

anything" (R. 390, 392). As the Besser representative expressed it, they were willing to pay Milewski for "not growing potatoes" (R. 393).

Warren was a manufacturer of concrete blocks at Knoxville, Tennessee, who had developed a concrete block machine marketed by Roy Darden Industries of Atlanta, Georgia (R. 529–30, 539). After Besser's president and its patent counsel had twice visited Warren in 1947 to urge that his machine infringed patents owned by or licensed to Besser (R. 531–2), the patent counsel on a further visit in 1947 proposed an arrangement under which Warren would receive a nominal salary from Besser; would build no more machines, and would give Besser the rights to present or future inventions made by him—an offer which Warren declined (R. 533–4).

In 1948, when Besser purchased the stock of Stearns owned by its president, Eugene F. Olsen, the representative of Besser in this stock purchase asked Olsen to agree to stay out of the concrete machine business for at least five years (R. 850–1). Olsen refused to agree to this. Later, after Olsen had sold his Stearns stock and had organized a corporation (known as Gocorp) to make concrete block machinery, a Besser employee (R. 131) advised Olsen that Besser was interested in buying out Gocorp and that, if he would do this, both he and his son would be offered "some kind of satisfactory position" (R. 133, 1023).

THE 1942 THREE-PARTY PATENT LICENSING AGREEMENT AND RESTRAINTS EFFECTED THEREUNDER

An agreement made in March 1940, which superseded various prior licensing agreements, gave Stearns an exclusive license under the Gelbman patents (Ex. 112, R. 1323–5).[17] In 1941 the licensors (Andrus and Gelbman) and Stearns sued a Besser customer (H. E. Bell Co.) charging that a Besser machine used by the defendant infringed one of the licensed patents (Ex. 10, R. 855, 1202). This suit, which was defended by Besser, eventuated in a judgment holding two claims of the patent invalid (*ibid.*). Following an appeal by the plaintiffs, the interested parties—Besser, Stearns and the patentees—negotiated a settlement which would "stop any further litigation" with respect to the Gelbman patents, and give exclusive licenses under these patents to the "only two firms in this business that amounted to anything" (R. 855–7). This settlement was embodied in the patent licensing agreement of December 7, 1942 (Ex. 10, R. 1201). The major provisions of this agreement are:

The appeal in the *Bell* suit is to be dismissed, and all claims against Besser by reason of its manufacture or use of the accused machine or

[17] The agreement provided, among other things, that all inventions and patents issued thereon made by any officer or employee of Stearns during the life of the agreement should be assigned to the licensors (*id.*, R. 1331–2).

similar machines are waived (*id.*, R. 1203). Besser and Stearns are given licenses under the Gelbman patents, but without power to sublicense (*ibid.*).[18] The licensors (Andrus and Gelbman) covenant that they will not grant any other license under their patents without the written permission of Besser and Stearns (*ibid.*). The parties are to share equally the expense of prosecuting alleged infringers, and are to determine by unanimous agreement what suits shall be brought, but any two parties may bring such a suit at their own expense and keep for themselves any damages awarded (*id.*, R. 1205). The agreement runs for the full term of the licensed patents, with Besser and Stearns each having the right to terminate the agreement after July 13, 1949 (*id.*, R. 1206).[19]

With the increase in demand for concrete blocks which came at the end of World War II (*supra*, p. 6), various concerns undertook the manufacture of concrete block machines. They were, as the district court said (R. 1023), "little fellows," 49 of the 53 companies in the business having together only 21.3% of total dollar 1948 sales (R. 1014), or, on the average, little more than 4/10 of 1% each. Development and improvement of concrete block machines were also undertaken, and

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[18] They were also licensed under any inventions made by the licensors during the term of the agreement (*ibid.*).

[19] The patent involved in the Bell litigation would expire July 12, 1949 (*id.*, R. 1202).

some of these efforts met with marked success. Darden, a manufacturer who began making the Warren 800 machine in 1946 (R. 472), testified that this machine had the highest production per hour of any machine then being produced (R. 509). A machine designed by Samuelson, which the Lith-I Bar Company manufactured under license, could make 480 blocks per hour (R. 384, 441).

Faced with this rising competition, Besser and Stearns, together with Gelbman, took steps to combat it. Roy Darden of Roy Darden Industries, Atlanta, Georgia, who was regarded as "the most aggressive in the lot," was selected as the first target (R. 486). In June 1946 Olsen, Stearns' president, wrote Gelbman that rumors were persistent that Darden was doing quite a lot of business and rather rapidly expanding his organization and, "It might be easier to knock his ears down now than later" (Ex. 52, R. 1259). In July Olsen wrote Jesse H. Besser (Ex. 54, R. 1261):

> I think it is important that we move in on this case (if it is justified at all) because I know that Darden has some rather ambitious plans including the manufacture of a high-production vibrator machine which * * * would make it really effective competition.

In October Besser's sales manager reported from Atlanta that the machine sold by Darden was

manufactured by the Link Belt Company, that manufacture was contemplated "not only in Atlanta but in Dallas, Chicago, San Francisco and in other Link Belt plants", and that this presents a situation which "should be cleared up very quickly" (Ex. 19, R. 1215–6).[20]

After the parties to the 1942 contract had jointly agreed that Darden should be sued for infringement (Exs. 56–57, R. 1263–4), suit was filed against one of Darden's customers in January 1947 (R. 480). Darden did not think that the Warren machine infringed or that the Gelbman patents were "any good" (R. 524),[21] but he quickly capitulated because told by his supplier that he would get no more supplies until the patent litigation was "cleared up" (R. 485–6). Darden requested a license under the Gelbman patents, but Besser and Stearns "flatly refused," Olsen explaining that Besser and Stearns could take care of all normal demands and "there is not any room in this business for your company" (R. 482–3). Olsen said further: "I want you to know we intend to go after them, after the others, at the rate of one every four months until we get them all" (R. 487).

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[20] Besser's president also made two trips to Atlanta to investigate the Darden situation (Ex. 53; R. 1260).

[21] This belief seems to have been well founded. The Court of Appeals for the Sixth Circuit has held invalid certain claims of the two major Gelbman patents. *Whitman* v. *Andrus*, 92 U. S. P. Q. 291, decided February 18, 1952.

The settlement which was agreed upon provided: the infringement suit against Darden's customer would be dismissed; Darden was licensed under the Gelbman patents as to the machines in process of manufacture (limited to 35 machines, including five Warren 800 machines); and Darden agreed not to make or sell any other machines coming within the claims of the Gelbman patents (Exs. 25, 76–77; R. 1224–8, 1274–6).

Besser and Stearns wanted "as much publicity as possible" for the Darden litigation, and a series of advertisements "stressing the patent situation" was proposed in the belief that this would make the industry "patent minded" (Exs. 58–59, R. 1264–5). Stearns wanted the advertising to be by the patentees, and suggested that it "state emphatically" that only Besser and Stearns are licensed under the Gelbman patents (Ex. 68, R. 1268). Besser enthusiastically approved the proposed advertising (Ex. 71, R. 1271). In its letter to Gelbman with reference to the advertising and the Darden litigation, it clearly disclosed its objectives, stating (*ibid.*, R. 1271–2):

> About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important. That is the

> way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents.

The patent owners had been willing to license Darden (R. 499), as they have been willing to license other applicants (R. 877), but under the 1942 agreement they were powerless to do so without the consent of Besser and Stearns.[22] Those who applied to the patent owners for licenses were advised, after the necessary consents had been withheld, that the patentees were unable to do anything (R. 499–500; Exs. 15, 18, R. 1212, 1214).

The district court found that it was Besser's objective to bring about the elimination of almost every competitor through "recklessly made threats of [infringement] suit" (R. 1024). The evidence amply supports this finding.

In 1948 Besser's patent counsel, Stark, visited Graveley, a block machine manufacturer at Orlando, Florida (R. 152, 158). Stark, after telling Graveley that his machine infringed and that he could not possibly get a license under the Gelbman patents (R. 163–4), warned that "they could and would sue me [Graveley] and keep me tied up for a long period of time if I made an auto-

[22] Consent was given only when, as in the case of Darden, a maker, threatened with patent litigation, had agreed not to make further machines and received a license covering a few machines already made or in process of manufacture (R. 221–3; Ex. 24, R. 1221–3).

matic block machine, whether or not infringement was involved" (R. 159, 163–4, 165). When Graveley said that he had every reason to believe he would be successful in such a suit he was reminded that he could not afford to be tied up in this way "win, lose, or draw" (R. 166). Graveley could not "afford a long drawn out lawsuit," and abandoned the business of making block machines (R. 168–9).

In 1948 Stark also called upon Winn, a concrete block machine maker at Greensboro, North Carolina (R. 198, 203). Stark told Winn that he was violating certain patents although Stark had not inspected Winn's machine and had merely passed, on his way upstairs, a machine that was being assembled (R. 203, 206). Stark further said that he was going to Florida to interview manufacturers there, but was returning in two weeks and "expected to find our plant closed down" (R. 208). Similarly, after Olsen had formed Gocorp but before it had built a machine, a Besser representative told Olsen that Besser was going to sue Gocorp for patent infringement (R. 120).

Stark and another Besser representative called upon Milewski of Lith-I-Bar in 1948 and intimated that Lith-I-Bar would be sued for infringment and that such litigation might involve expenses as high as $200,000 (R. 388, 390). Milewski was also told that Besser could and might make a directly competitive machine and under-

sell Lith-I-Bar to the point where it "would be driven out of business" (R. 388, 390–1).

In May 1946 Besser's southeastern sales manager visited two small manufacturers of concrete block machines at Birmingham, Alabama, and after a cursory inspection of their machines, advised that they were infringing (R. 544, 552–5). The makers then indicated that they would stop manufacture without further notice (R. 554, 555).[23] The sales manager also stated that he had orders from Besser to contact makers of concrete block machines and that other representatives of Besser would also "perform that chore of calling on manufacturers of block machinery" (R. 555–6).

Besser representatives warned numerous block makers who were using or about to purchase machines other than those of Besser or Stearns, that the machines were infringing (R. 52, 361–2, 439, 447, 466–7, 532, 548).

BESSER'S ACQUISITION OF CONTROL OF STEARNS

Appellants are not now contesting the findings made by the district court as to Besser's secret purchase of stock of Stearns, as a result of which

[23] One of the companies, Fifth Avenue Fabrication Co., made no vibrating machines after 1946 (Ex. 190, R. 1409). The other company, Southern States Materials Co., made no machines of this kind in the 1946–1948 period (*ibid.*, R. 1410).

"Besser's hold on its second chief competitor[24] became, to all intents and purposes, complete" (R. 1022–3). We set forth, however, the steps by which this control was achieved because they have a direct bearing on the district court's conclusion that appellants have illegally monopolized interstate commerce in concrete block machines, which appellants do contest.

In 1945 Olsen, then president of Stearns, told Jesse H. Besser that, on the expiration of Besser's plain pallet patent (expiring in 1946, *supra*, p. 6), Stearns was going to start making a three-at-a-time plain pallet machine (R. 585, 774). Besser's president then asked Pierce Wright, Besser's labor relations adviser, to act as Besser's agent in buying stock of Stearns (R. 584, 586). Jesse H. Besser gave as the reason for purchasing this stock that "he wanted to be the only person manufacturing the plain pallet machine," and "wanted to have some hand in any other company" that made this machine (R. 587).[25] Acting on the instructions of Besser's president,

[24] Stearns unquestionably was Besser's chief competitor. In 1948 Stearns had 12.9% of total dollar sales (App. Br. 9), while the two companies with the next largest sales had, respectively, 7.8% and 5.9% of the total (R. 1014). The district court, in referring to Stearns as Besser's "second chief competitor" plainly meant to describe Stearns as second in the industry and Besser's chief competitor.

[25] Jesse H. Besser, when asked at the trial if Stearns' contemplated production of the three-at-a-time plain pallet machine was the primary reason for buying Stearns stock, replied that it was "a very important reason" (R. 774).

Wright (1) arranged with a broker to buy as much Stearns stock as he could without pushing up the price of the stock; (2) kept the name of the buyer secret; (3) paid for purchased stock with money received from Besser and deposited in a special account in a bank other than the one with which Wright usually did business; (4) selected certain individuals to act as nominees for purchased stock;[26] and (5) promptly delivered the stock certificates to Besser after the nominees had assigned them in blank (R. 587, 589–92).

13,765 shares were purchased in this way in 1946 (R. 592). On Jesse H. Besser's instructions, purchases were discontinued in 1947, but in the latter part of that year Wright was asked to buy, if possible, all the stockholdings of Stearns' officers, the bulk of which was held by Olsen (R. 592–4). It was arranged to act through a Chicago broker, who was instructed to keep the name of the purchaser secret (R. 594–6). Jesse H. Besser fixed as one of the conditions of purchase from Olsen that Olsen agree to stay out of the concrete block machine business for five years, but when Olsen said that he would not agree to do this, the Besser agents were told to go ahead with the purchase (R. 597–8). Purchase of 61,325 shares was closed on March 26, 1948, Besser giving its check

[26] Wright selected as nominees his own counsel, one Vera Dixon (subsequently Mrs. Pierce Wright), a Cleveland attorney, and a Detroit industrial engineer (R. 590–1).

for $813,750 in payment (R. 598–9; Exs. 36–37, R. 1252–1254A).[27]

Besser obtained, by these and other purchases, between 85,000 and 89,000 shares of Stearn's stock, out of about 189,000 shares outstanding (App. Br. 34).[28] A special meeting of Stearns' stockholders was held on May 4, 1948, and a new board of directors was installed consisting of men in whom Besser's president had confidence (R. 602–3, 932).[29] On the same day new officers were elected (R. 603–4). Myron Hultmark, Besser's district sales manager for the Chicago district, was made president and general manager, Wright was made vice president,[30] and Delamater, secretary (R. 604, 929, 933).

The rumor that Besser had purchased the stockholdings of Stearns' officers quickly spread and makers of concrete blocks were gravely concerned by the monopoly situation this would create (R. 115). A meeting called by the executive secretary

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[27] 40,000 shares were placed in Wright's name and the balance in the name of Myron Hultmark, the nominees executing assignments in blank and delivering the stock certificates to Besser (R. 600).

[28] The remaining shares were scattered among many small stockholders (R. 660), the largest single holding in November 1948 being 6,000 shares (Ex. 39, not printed).

[29] Only one member of the new board (Delamater) had been a member of the previous board (R. 602–3).

[30] Wright testified that since he was elected a director and vice president of Stearns on the basis of stock owned by Besser, he always was under the impression that in these positions he "represented" Besser (R. 654).

of the National Concrete and Masonry Association was held in Chicago on April 14, 1948, and attended by representatives of some 12 or 14 of the biggest concrete block plants in the United States (R. 111–2).[31] Olsen was also asked to attend (R. 111). The view expressed at the meeting was that, if Besser had acquired the Stearns stock, the block makers would take steps to start a concrete block machine company of their own "because they were not willing to be put in a position where they would have to go to one concern for high production block machinery" (R. 115). When Olsen stated that he planned to go into the business again, the block makers said that they would not go ahead with their own plans since their essential interest was to have more than one source of supply for high-production block machinery (*ibid.*).

BESSER'S PURPORTED SALE OF STEARNS STOCK AFTER INSTITUTION OF PRESENT SUIT

One of the prayers of the Government's complaint is divestiture of all of Besser's interests in Stearns (R. 11). In February 1950, nearly one year after the filing of the complaint and shortly before trial, a Besser representative began negotiating a sale of its Stearns stock to one Ben Stone

[31] Companies located in the states of Colorado, Illinois, Indiana, Iowa, Kentucky, Missouri, New York and Wisconsin were represented at the meeting (R. 113).

(R. 675, 677). Stone, who lives in Detroit, had a heating company, and was engaged in building a group of houses in a Detroit suburb (R. 657).[32] These negotiations resulted in a contract made on March 30, 1950, providing for sale to Stone of 45,000 shares of Stearns stock (Ex. 159, R. 1374).

The judgment of the district court (par. IV B) required cancellation of the Stone contract (R. 1057), and the contract has been canceled (App. Br. 37) and appellants raise no issue concerning this. We nevertheless call attention to the provisions of the contract and other aspects of the "deal" with Stone because of the light which they throw on appellants' continued purpose to monopolize the concrete block machinery business.

The Stone arrangement has many striking, if not peculiar, aspects. Stone, who agreed to make an ultimate payment of $270,000 for the stock of Stearns, knew "nothing whatever" about the concrete block machine business (R. 683); testified that he "saw very little profit" in Stearns' block machine business, which fact was what "appealed" to him in "making this deal" (R. 668); believed that Stearns' physical plant was "old, dilapidated, and inefficient" (R. 674); planned to sell off the physical plant to obtain additional working capital, acquire the plant of Olsen's Gocorp Corporation and then go into the business of making

[32] Stone testified that his business was investing in businesses for the purpose of operating them at a profit (R. 657).

aglite[33] (670–1, 673–4). In short, Stone's plan was that Stearns should go out of the concrete block machine business.

The Stone contract protected Besser's monopolistic position and, indeed, fortified it in the event that Stone did not carry out his plan to have Stearns abandon the concrete block machine business. The contract provided that Stone should cause Stearns to accept a patent license from Besser upon terms which would restrict and handicap Stearns as a competitor of Besser, and failure to bring about Stearns' acceptance of such license gave Besser the right to void its sale of Stearns stock (*infra*, p. 30).

The Stone contract provides (Ex. 159, R. 1374–7):

Stone is to purchase from Besser 45,000 shares of Stearns stock for $270,000,[34] $10,000 to be paid immediately and the balance in increasing amounts on March 1, 1951, 1952, 1953, and 1954 (par. 1).[35] Until March 1, 1954, Stone is to have

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[33] Aglite is a process for producing, from clay and shale, material suitable for making concrete blocks, and the shortage of cinders gave importance to development of other suitable raw material (R. 759–60). Stone testified that aglite was "the thing that really made me enthusiastic" and that, without this feature, he would not have been interested in the deal (R. 671).

[34] The sales price of $6.00 a share compares with the price of over $13.00 a share paid by Besser when it acquired 61,325 shares of Stearns stock about two years earlier (*supra*, pp. 24–25).

[35] Until March 1, 1954, Besser is to receive the dividends declared on this stock, except that on each dividend after

all voting rights on the 45,000 shares and on all other shares of Stearns currently owned by Besser (par. 2), and until that date Stone is given an option to meet the terms of any bona fide offer for purchase of additional shares of Stearns owned by Besser (par. 3). Stone will use his voting rights to cause his election as president and general manager of Stearns (par. 6). Besser will transfer to Stearns all of Besser's inventories and other assets relating to machinery for the manufacture of aglite, Stearns paying the cost thereof less a credit of $30,000 (par. 9).[36] Stone may terminate the agreement at any time and Besser may terminate it for any default by Stone (par. 5).[37]

The provisions of the contract which here are of perhaps greatest significance are those relating to Stearns' acceptance of a patent license from Besser. "Stone will do everything within his power" to cause Stearns to accept a patent license from Besser (par. 7). Such license shall authorize Stearns to manufacture and sell (1) cored pallet machines without limitation as to size or kind and (2) plain pallet machines pro-

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March 1, 1951, Stone is to receive an amount proportionate to the part of the $270,000 purchase price then paid (par. 4).

[36] Stearns also assumes all of Besser's obligations under a certain contract relating to this business (par. 9).

[37] Upon termination by either party, Besser shall refund to Stone any payments made by him on account of his purchase of Stearns stock, less $10,000 (par. 5).

ducing not more than one or two blocks simultaneously,[38] and shall require Stearns to pay substantial royalties to Besser and to recognize and accept the validity of any concrete block machinery patents "owned, controlled or licensed by Besser" (par. 8). Stone's failure to bring about Stearns' acceptance of such license shall give Besser the right to "declare void" the sale of 45,000 shares (par. 7).

Stone agreed to these provisions without knowing what patents Besser had or controlled (R. 687), without reading certain Besser patents which he was shown (R. 666), without inquiring as to the patents which were the basis for the statement in the purchase contract that "there exists presently a serious question of infringement of patents by Stearns" (R. 663–5), and without seeking the advice of counsel on Besser's patents (R. 667). And prior to the making of the Stone contract Besser had never at any time advised Stearns that it was infringing any Besser patent (R. 942–3).[39]

Besser's president discussed with Wright, whom Besser had installed as vice president of Stearns (*supra*, p. 25), the terms of the contem-

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[38] The fact that Stearns was going to make a plain pallet three-at-a-time machine was what chiefly induced Besser's acquisition of Stearns stock (*supra*, p. 23), and Besser's president testified that the Stearns machine "that is used mostly is the three-at-a-time" (R. 732).

[39] Stearns, like Besser, currently was a licensee of the Gelbman patents.

plated Stone contract (R. 606–7). Wright advised Besser's president that the terms of the proposed contract "would cause quite a commotion" among Stearns' other stockholders (R. 614), and that rumors about the Stone contract were running around and "the stockholders were all up in arms about it" (R. 618). Wright was told that Besser was going through with the Stone commitment, that it was in contract form and would be filed with "the Antitrust attorneys," and "he [Jesse H. Besser] was reasonably sure he would be able to teach those government jaspers a lesson and get what he wanted" (R. 616).

Facts relating to Besser's monopoly position in the industry following its acquisition of control over Stearns, and to Besser's policy (adopted in October 1947) of leasing and not selling Besser's most advanced machine, are set forth in the Argument (*infra*, pp. 39–42, 65–67).

SUMMARY OF ARGUMENT

Appellants do not attack the holding that they have attempted to monopolize commerce in concrete block machines. This violation, even if it stood alone, would justify the relief awarded by the district court's judgment. Accordingly, it may be unnecessary, on this appeal, to reach the further holdings that appellants monopolized commerce and that they combined with the non-appealing defendants to restrain commerce. In any event, the holdings are correct.

I

Acquisition of power to exclude competitors from a given field of commerce, with intent to exercise such power as occasion therefor arises, is a forbidden monopolization of a part of interstate commerce. *American Tobacco Co.* v. *United States*, 328 U. S. 781. The finding, not here attacked, that appellants attempted to monopolize necessarily imports intent by appellants to exclude competitors, since such intent is an essential ingredient of attempt to monopolize. In any event, the evidence abundantly establishes such intent. The evidence likewise establishes power to exclude. It is undisputed that appellants had or controlled 65% of the industry's dollar sales, that the sales thus controlled were more than eight times those of their nearest competitor (which had 7.8% of the total), and that the remaining 27.2% of total sales were divided among 50 odd companies, truly characterized by the district court as "little fellows." Appellants thus dominated the industry to a degree even exceeding that of the defendants in the *American Tobacco* case.

II

The holding that appellants combined with the non-appealing defendants in illegal restraint of commerce is supported by the 1942 license agreement, to which all defendants were parties, and

the action taken thereunder. The agreement contemplated joint action by the two "giants of the industry" in denying licenses to their competitors and in bringing infringement suits. Pursuant to this agreement the parties cooperated in utilizing rights claimed under patents as a means of excluding competitors, for the declared purpose of securing "a certain measure of control" over the industry. Such joint action goes to ends forbidden by the Sherman Act and transcends privileges conferred by the patent grant.

The holding of unlawful combination is likewise supported by the finding and evidence that the defendants, both jointly and individually, deliberately embarked upon a campaign of harassing competitors through reckless threats of infringement suits, "whether or not infringement was involved."

III

The relief granted by the district court's judgment is appropriate and necessary to disperse appellants' monopoly power, deprive them of the fruits of their monopolistic practices, and terminate their unlawful combination and conspiracy. It plainly does not exceed a proper exercise of the district court's discretion. The judgment which has been entered, apart from certain minor changes to which the Government does not object, should be sustained.

A. Appellants' objection that too short a time was allowed for divestiture of their Stearns stock is without merit. The district court had ample

reason for concluding that prompt outright divestiture was imperative, in order to bring to an end appellants' hold on the industry before this hold became so firmly established as to become, or threaten to become, permanent. If, after a bona fide effort to effect stock divestiture, a showing is made that more time is needed, the United States will not object to a reasonable extension of time.

B. The policy which appellants adopted late in 1947 of making their most advanced machine available only under lease resulted in a substantially greater cost to the block maker for use of the machine than if he had been able to purchase it. The leases perforce accepted by would-be purchasers of this machine were a product of appellants' monopolistic position in the industry, and particularly in the manufacture of the type of machine which appellants refused to sell. In order to relieve those lessees who would prefer to purchase from the excess burden so forced on them, the district court ordered appellants to give each existing lessee an option to terminate the lease, to continue it, or to purchase the leased machinery on mutually satisfactory terms. This was proper and necessary relief. Cf. *International Salt Co.* v. *United States*, 332 U. S. 392.

C. In view of the fact that misuse of rights claimed under patents largely contributed to the illegal attempt to monopolize, monopolization, and

restraint of trade which the district court found, it was fully justified in requiring the licensing of present and future patents at fair royalty rates. Like provisions have been repeatedly sustained by this Court. The ten-year period within which future patents are to be subject to the licensing requirement is comparable to periods approved by this Court in other cases. The licensing machinery chosen by the district court was, in substance, that suggested by certain of the defendants, and as to the patents of the non-appealing defendants it has worked successfully. If, however, this Court should conclude that some other machinery is more appropriate, we urge that it direct substitution of the machinery which the Government proposed in the court below and which this Court has approved in numerous cases.

ARGUMENT

INTRODUCTION

Appellants concede (Br. 6, 52, 85) that the district court's finding that they attempted to monopolize the concrete block machine business is supported by evidence sufficient to withstand appellate challenge. Appellants' contention is that the evidence does not warrant the findings that they monopolized, and conspired with the other defendants to restrain and monopolize, commerce in block machines. The Government believes that

these findings have ample evidentiary support (see points I and II, *infra*, pp. 37–53). The issue on this appeal, however, is whether the provisions of the judgment should stand. To the extent that the judgment provisions which are under attack constitute relief appropriate to prevent further attempt to monopolize and to dissipate consequences of the past unlawful attempt, the question of whether appellants have violated the statute in other respects need not be reached. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314.

Appellants seek modification or limitation of various judgment provisions, but attack only three basic requirements of the judgment—(1) that appellants grant existing lessees of their machines an option to purchase leased machines, (2) that the 1942 licensing agreement to which appellants and the other defendants are parties be canceled, and (3) that appellants grant a license under their concrete block machine patents at a reasonable rate of royalty to any applicant therefor. We believe that each of the foregoing requirements constitutes appropriate and necessary relief even if attempted monopolization is assumed to be appellants' only violation of the statute.

I

APPELLANTS HAVE MONOPOLIZED INTERSTATE COMMERCE IN CONCRETE BLOCK MACHINES, IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT

In *American Tobacco Co.* v. *United States*, 328 U. S. 781, this Court carefully considered the meaning and effect of the prohibition of Section 2 of the Sherman Act against monopolizing any part of interstate commerce. The Court there held that there is unlawful monopolization when there is power "to exclude actual or potential competition from the field," coupled with "the intent and purpose to exercise that power" (*id.*, 809). The Court specifically held that "actual exclusion of competitors is not necessary to" the offense of monopolizing (*ibid.*). It likewise held that the power of exclusion exists when there is power to exclude competitors "to a substantial extent" (*id.*, 786).

Appellants do not question the finding below that they have engaged in an unlawful attempt to monopolize. An attempt to monopolize, however, requires not only acts but the intent to obtain and to exercise power to exclude competitors. "Intent is * * * essential to" the offense of attempted monopolization. *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The unchallenged finding of attempted monopolization necessarily imports, therefore, a finding of the intent which, when coupled with power to exclude

competitors, constitutes the offense of monopolizing. Cf. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173.

But with respect to intent to exclude competitors, we need not rest on what is implicit in appellants' concession made as to their attempt to monopolize. We submit that the evidence not only justifies, but requires, the finding of appellants' intent to exclude competitors.

For example:

(1) Appellants absorbed their leading competitors as opportunity therefor arose, a course of conduct culminating with acquisition of control over Stearns (*supra*, pp. 10–14, 22–26). By this last step appellants brought under their control a company which, in the words of one intimately acquainted with the industry, was the only other concern "in this business that amounted to anything" (R. 857). (2) Appellants, even after institution of the present suit, took steps to throttle the competition of Stearns in the event that the controlling block of Stearns stock held by appellants should pass from their hands (*supra*, pp. 26–31). (3) Appellants combined with their only really important competitor to eliminate other competitors, by jointly using rights claimed under unadjudicated patents of doubtful validity to threaten them with costly infringement suits, and by refusing to allow them to obtain patent licenses (*supra*, pp. 15–22). (4) Ap-

pellants have unmistakably avowed their purpose to exclude or limit competition, by admitting that what motivated the Stearns acquisition was its contemplated manufacture of a machine comparable to the most advanced and efficient machine being made by Besser (*supra,* p. 23), and by such statements as the following made by Besser through its president (R. 1024):

> About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important.

With respect to *power* to exclude competitors, the undisputed facts establish a dominance of the industry surpassing that of the "Big Three" of the industry who were found guilty of monopolizing in the *American Tobacco* case. The "Big Three's" combined share of total industry production had been declining, not progressively increasing, and during the past three years shown by the evidence went from 73.3% to 71%, and from 71% to 68% (328 U. S. at 794–795). The remaining production was divided among six companies, no one of which had ever attained more than 10.6% of total production (*id.* 795). But Besser, who had bought Stearns under its control, had, together with Stearns, 49.7% of the dollar sales of the industry in 1946, 67.2% in

1947, and 65% in 1948 (R. 1013)[40] Even more significant on the question of power to exclude is the fact that the remaining 35% of 1948 dollar sales was divided among 52 companies, and the two with the largest dollar sales had only 7.8% and 5.9% of the total (R. 1014). Thus Besser (plus the company controlled by it) had dollar sales more than eight times those of its nearest competitor and more than eleven times those of its next competitor.[41]

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[40] Appellants suggest (Br. 57) that, in determining Besser's exclusionary power, no consideration should be given to Stearns' sales for 1946 and 1947 and for ⅓ of 1948. This is obviously not the proper test to apply. Stearns was brought under Besser's control. As to the period subsequent to acquisition, the combined sales of the two companies concededly furnish the yardstick to apply in gauging Besser's position in the industry. But in so far as sales for a prior period are given consideration, in order to have a more balanced picture than is possible on the basis of sales figures for only one year, the sales of the two companies during the prior period must likewise be combined if they are to represent correctly the position in the industry attained by appellants (Besser and its president), and their concomitant power to exclude competitors.

[41] The "dollar volume" measurement has been used as a measure of the existence of monopoly power in antitrust cases and governmental studies. See *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364; *United States* v. *American Can Company*, 87 F. Supp. 18 (N. D. Cal.); Monograph No. 21, "Investigation of Concentration of Economic Power," Temporary National Economic Committee (76th Congress, 3rd Session, p. 115); Department of Commerce Report (Census of Manufacturers) to House of Representatives Subcommittee on

Besser's patent counsel and another representative, when they called upon the president of the largest independent competitor (Lith-I-Bar), merely put into words what was implicit in Besser's dominant position in the industry. They advised this competitor that Besser "could and might enter into the field of making a machine directly competitive with us and undersell us to a point where he would be driven out of business" (R. 391).[42]

Appellants urge (Br. 59–60) that the continued existence of some small competitors and the recent emergence of one competitor (Olsen's Gocorp Corporation) refute power to monopolize. Before a jury or trial court these facts might be urged as grounds for inferring lack of power to exclude. That they do not require this inference was held in the *American Tobacco* case, which was decided on the assumption that the prosecution had neither claimed nor established any actual exclusion of

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Study of Monopoly Power (Celler Committee) dated December 1, 1949. Its use here was appropriate for the reasons stated by the district court (R. 1013). Indeed, other evidence in the case indicates that if the 65% figure is in any respect inaccurate it is too low rather than too high. For example, in 1947, prior to the commencement of this suit, Besser estimated (Ex. 3, R. 1183) "conservatively that Besser machines produce 80% of the concrete block made in the U. S. A."

[42] At this same meeting the competitor was threatened with costly patent litigation, and was told that Besser "considered it imperative that the Lith-I-Bar Company be out of business" (R. 390–1).

competitors (328 U. S. at 787). Here the district court, having heard the evidence, including evidence of actual exclusion of certain important competitors, found monopolization. The evidence is in all respects consistent with the court's finding.

II

APPELLANTS COMBINED AND CONSPIRED WITH THE NONAPPEALING DEFENDANTS TO RESTRAIN TRADE AND COMMERCE, IN VIOLATION OF SECTION 1 OF THE ACT

The district court concluded that by the 1942 license agreement, and by joint action taken thereafter, appellants had conspired with defendants Stearns, Andrus and Gelbman to restrain and monopolize trade (R. 1028). Accordingly, it held that agreement illegal (R. 1021) and adjudged it "null and void" (R. 1065). The court further held that Besser and (at least inferentially) Stearns and Gelbman had abused their patents by harassment of asserted infringers and reckless threats of suit (R. 1024–1025). Appellants vigorously attack both holdings.

A. THE 1942 LICENSE AGREEMENT

The terms of the 1942 agreement, and the circumstances leading to its adoption, are set out in the Statement, *supra*, pp. 15–22. Appellants argue that it was a mere "joint exclusive license" which, they assert, is in no way prohibited by the antitrust laws (Br. 66), and that its "only effect was

to eliminate litigation between" Besser and Stearns (Br. 65). But it is apparent on the face of the agreement that its effect was much more than that. By its terms the agreement called for joint action by the parties to it, and thus by Besser and Stearns, which were the two largest companies in the field of block machine manufacturing and each of which was the other's principal competitor.

Although the agreement gave neither Besser nor Stearns a right to sublicense, Gelbman[43] covenanted not to grant any licenses without the written approval of both of them (Ex. 10, R. 1203). And the parties agreed that determination of what infringement suits were to be brought should be made unanimously by all three parties but with the proviso that any two could prosecute, in which case the third shared none of the expense or recovery (Ex. 10, R. 1205). Thus, on its face, the agreement sets up machinery for joint action by the two largest companies in the industry to determine who will or will not receive licenses under the patents of a third party, and to determine when and against whom infringement suits should be brought. The agreement applied not only to the nine patents and applications listed in the license but also to any future inventions of Gelbman in the field to which it related. It extended for the life of the patents and applications listed and

[43] We shall sometimes refer to both licensors as "Gelbman" (see p. 4, *supra*).

could, as to subsequent inventions, be further extended, subject to the privilege of Besser or Stearns (but not Gelbman) to terminate after July 13, 1949 (*id.* R. 1205–1206).

The record is replete with evidence that the purpose of the agreement was far broader than a mere compromise of litigation.[*] Gelbman testified that it was intended not only to "stop any further litigation" with respect to the Gelbman patents—and hence any further challenge by Besser to their validity—but also to confine licensing under them to "the only two firms in the business that amounted to anything." (R. 855–7). Indeed Besser's purpose to monopolize the industry was better served by abandoning its attack on the Gelbman patents and by placing itself in a position to use those patents, jointly with Stearns, as a means of suppressing competition of others. Besser's view of the importance to it of maintaining the validity of the Gelbman patents is well expressed in Besser's letter to Gelbman, signed

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[*] A contract of compromise is subject to the Sherman Act, like any other contract, and if it is used to suppress competition is illegal. *United States* v. *Masonite Corp.*, 316 U. S. 265; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 174, 175; *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38 (C. A. 3).

It should be noted that the 1942 agreement went far beyond the scope of any existing patent controversy. The Bell suit involved two claims of one of the Gelbman patents. The 1942 license covered nine patents and applications and any further inventions which Gelbman or Andrus might make during the life of the agreement (R. 1202–1203).

by Jesse H. Besser, stating (Ex. 71, R. 1271–1272):

> About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important. That is the way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents.

That this view was shared by Stearns and Gelbman is reflected in the proposal, enthusiastically approved by all three, for a series of advertisements "stressing the patent situation," which would "state emphatically" that Besser and Stearns were the only licensees under the Gelbman patents (*supra*, p. 19). As Olsen (President of Stearns at the time) testified, "The intent was to enter into an agreement whereby the two companies would, unless they changed their mind, be the only licensees" (R. 149).

The scope of the mutual consultation between Besser, Stearns, and Gelbman to achieve this objective of maintaining "a certain measure of control" through the Gelbman patents is perhaps best illustrated by the extensive correspondence and discussion relating to the activities of Roy Darden (Exs. 19–21, 51–59, 63, 67, 68, 70–72, 78–81, 84; R. 1215–1218, 1258–1273, 1276–1281). Darden's

competition was especially feared because he was starting to produce an efficient high-speed machine, and because he appeared to have back of him the financial resources of the Link-Belt Company (*supra*, pp. 17-18.) Some time prior to June 12, 1946, Jesse H. Besser investigated Darden's operations and spoke to Gelbman about them (R. 1258). In June, 1946, Olsen, of Stearns, wrote Gelbman, with a copy to Besser for comment, suggesting that "it might be easier to knock [Darden's] ears down now than later" (R. 1259), and in July he wrote Besser asking for its comments on the situation and pointing out that Darden's plan included "the manufacture of a high-production vibrator machine which * * * would make it really effective competition" (R. 1261). On July 31, 1946, Besser's distribution manager wrote Gelbman, stating that he had discussed the Darden matter with Jesse H. Besser and with Olsen, and that both wanted Gelbman to institute suit (R. 1263). In November, 1946 Gelbman wrote Besser, with a copy to Olsen, suggesting that "all of us * * * get together" with Larsen, who had been retained as a patent investigator (R. 1267).

Thereafter, a notice was sent to Darden to stop infringing (R. 1273). On January 15, 1947, Gelbman wrote identical letters to Besser and Stearns, stating that Darden had asked for a license, and adding, "Kindly advise me what your pleasure

is in the matter" (R. 1217). Olsen, for Stearns, replied on January 21, 1947, that he was in favor of continuing the suit and added, "There are a lot of angles to this and you, Jesse [Besser] and I should have a heavy session on this matter the first time we can get together. This is likely to be at the Chicago meeting in February" (R. 1218). The three parties decided to end the suit by giving Darden a limited license permitting him to make a limited number of machines then in production. A preliminary agreement to that effect was entered into on February 20, 1947, between Darden, Gellman, Besser, and Stearns (Exs. 76–77, R. 1274–6), and was later finalized. (Ex. 25, R. 1224.)[45]

We think it clear that such joint action by competing manufacturers with respect to the licensing of and suits under the patents of a third party violates the antitrust laws. This is particularly so where, as here, the participants are by far the two leading companies in the field and the patents to which the joint action relates are asserted by

[45] Not long thereafter, on April 17, 1947, Stearns wrote Gellman, with a copy to Besser, suggesting that "it would be wise to start suit against some user of one of the other infringing machines. Our opinion—based on all the angles—is that maybe we should check up on 'Lith-*O*-Bar' next" (Ex. 81, R. 1279). Lith-I-Bar is the third in the industry in dollar sales (R. 1014). For Besser's threats of infringement suits against Lith-I-Bar, and its attempt to buy Lith-I-Bar out by paying its president for "not growing potatoes" (R. 393), see pp. 13–15, *supra*.

the parties to be of prime importance in the manufacture of the most efficient and up-to-date type of machine. Plainly, absent the existence of patents, an agreement by two competitors to take joint action to eliminate or regulate the competition of others would violate the antitrust laws. And the fact that the agreement here related to patent rights did not give the parties a "universal license" to violate the prohibitions of the Sherman Act. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. Assuming that the action taken to deny licenses and sue asserted infringers [46] would have been within the scope of the patent grant if taken by a single patentee holder, that fact would not render permissible the joint action taken by competing manufacturers. As the court below said, "It is this combination requiring collective action that primarily invalidates the agreement" (R. 1021).

In *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524 (S. D. N. Y.), affirmed, 332 U. S. 319, Judge Rifkind held that although a single patent owner could refuse to license at will—

> where there is a refusal to license (or refusal to license except on specified conditions which would extend the patent monopoly) which is the product of agreement or conspiracy, on the part of the owners of

[46] But see *infra*, pp. 53–58, pointing out that infringement suits were used by the parties as a means of unlawful harassment under color of assertion to patent rights.

> competing patents, I believe, the law is offended to the same extent as the law is violated when several combine and agree not to do business with a particular customer or class of customers.

Similarly, in *United States* v. *General Instrument Corp.*, 87 F. Supp. 157 (D. N. J.) the court held invalid a patent pool by which dominant manufacturers of variable condensers combined their patents in a single licensing agency. The court said (pp. 195–6):

> The Development parties exceeded the boundaries of permitted cross-licensing of the patents separately owned by them when they vested in their creature, Development, the power to grant licenses and to use those licenses for aggressive or defensive purposes. * * * the normal patent monopoly with its products of legitimate cross-licensing and royalties, is extended to give multiple advantages to individual patent holders dominant in the industry by combining their patents and affording the mechanism to reap mutual rewards greater than their individual patents would justify.

(See also *id.*, p. 191.)

A like result is produced here. The 1942 agreement covered not only Gelbman's inventions, but also Olsen's and Stearns' inventions, which had been assigned to Gelbman under a grant-back provision of Gelbman's prior license to Stearns (Ex. 10, R. 1202; Ex. 112, R. 1323;

App. Br. 13). While Besser's patents were not included in the 1942 agreement, they were combined with the Gelbman-Olsen-Stearns patents in the sense that the same policies with respect to licensing and infringement which were adopted and adhered to cooperatively by Besser and the other parties to the agreement were also applied by Besser to its own patents. Thus Besser's agent charged competitors with infringement under both Besser's Scott patent and the Gelbman patents (R. 203, 439; Ex. 95, R. 1291, Ex. 98, R. 1295). See *Whitman* v. *Andrus*, 92 U. S. P. Q. 291 (C. A. 6). Besser's desire, as stated by its president, was to maintain "control" of the industry "through Gelbman vibration patent and Besser plain pallet stripper patents" (*Supra*, p. 45).[47] Thus the result here is comparable to that under a closed patent pool, in which the parties combine their patents and financial power for the purpose of excluding others from use of the pooled technology and of controlling competition.

In *United States* v. *Line Material Co.*, 333 U. S. 287, two manufacturers had combined their pat-

[47] The situation here is markedly different from the "patent pool" sustained in *Standard Oil Co.* v. *United States*, 283 U. S. 163. The pool there was open on reasonable terms to all manufacturers desiring to participate (283 U. S. at 168). Moreover, the Court concluded that there was no evidence of substantial control by the defendants of either cracked gasoline or total gasoline production (pp. 176–177) and that there was no general intent or purpose to restrain trade (see pp. 171, 174, 175, 176, 178, 179, 182).

ents for the purpose of fixing the prices at which licensees might sell the product. The opinion of Mr. Justice Reed, which was the opinion of the Court, while not questioning the principle that a single patent owner could fix the price at which his licensees sold, held that that principle did not extend to a combination of two patent holders. He stated (333 U. S. at 311):

> While the *General Electric* case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and antimonopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products. Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. * * * The merging of the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods.

Similarly here, the "merging of the benefits" of the power to grant or deny licenses and to sue

asserted infringers produced a different result than would the act of a single patentee. It destroyed competition between Besser and Stearns to the extent that, although they presumably continued to compete with each other in trying to sell machinery, they united together in a concerted attempt to preclude effective competition with either of them from anyone else. The right to compete became a special privilege to be enjoyed only by Besser and Stearns. The "little fellows" had to face, not merely the major company, but the combined efforts of the two leading companies to drive them out of business. Finally, Besser, which absent the agreement would have been the company best equipped financially to challenge in the courts the validity of the Gelbman patents, became vitally interested in preserving their validity. The effect was to delay for about a decade the ultimate holding of invalidity. "It is as important to the public that competition should not be represented by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly * * *". *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 234.

Accordingly, we think it clear that the 1942 agreement and the acts taken thereunder, standing by themselves, were illegal. But they need not be viewed in isolation; "the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United*

States v. *Patten*, 266 U. S. 525, 544. Accordingly, the participation in the 1942 agreement of Besser, the only party to that agreement who has appealed from the holding of its illegality, must be viewed in the light of the other evidence of Besser's conduct, and particularly of the undisputed fact that Besser attempted to monopolize the business of block machinery and the finding that its plan of monopolization, begun at least as early as 1938 and continuing through its ultimate acquisition of Stearns, came to full fruition. That the 1942 agreement formed part of that plan is evident from what has already been said. We need only remind the Court of the letter of Jesse H. Besser stating that "about the worst thing that could happen to this industry would be to have it wide open," and that "that is the way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents."[48]

B. HARASSMENT OF COMPETITORS UNDER COLOR OF ASSERTION OF PATENT RIGHTS

This combination between competitors was, moreover, not limited to taking action which a single patent owner could legitimately have taken. On the contrary, Besser, Sterns and Gelbman, having combined their resources, proceeded, as the district court found, to take advantage of the ex-

[48] As the court below pointed out (R. 1022), the fact that the agreements extended to future inventions of Gelbman is a further indication of an intent to restrain trade and monopolize.

pensive nature of patent litigation to force competitors to discontinue operations.

Appellants devote no less than 26 pages of their brief (pp. 15–33, 73–81) to an effort to demonstrate that Besser's and Stearns' activity was no more than a bona fide enforcement of patent rights. Judge Picard held otherwise, however, and he was peculiarly qualified to evaluate appellants' contention, having presided at the trial of the patent infringement suit involving Gelbman's apparatus (2,275,678) and method (2,366,780) patents and appellants' Scott patent, *Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich.) (decided June 28, 1950, 5 days after the trial herein ended).[49]

We have set out (pp. 20–22, *supra*) some of the evidence on which Judge Picard's finding was based. We need only remind the Court of some of the incidents which illustrate its character. The defendants' purpose is evident in their attempt to make the industry "patent conscious" and aware that Besser and Stearns were the only licensees—thus putting the "little fellows" on notice that in any patent litigation the alleged infringer would be pitted against the combined financial strength of the two largest concerns.

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[49] In addition, at least nine manufacturers or users (other than Besser) of concrete block machinery testified herein, and in each instance (R. 169, 199, 218–219, 313–314, 324–326, 395–397, 442–445, 446, 471–476, 530–531) the court questioned them at length as to the type of machines which they were manufacturing or using and which the defendants had alleged to be infringements.

It is shown in their dealings with Darden, who, although he did not think the Gelbman patents "any good," was forced to capitulate when told by his supplier that he would get no more supplies till the patent litigation was cleared up. It was to Darden that Olsen said "There is not any room in this business for your company" and that "we intend to go after * * * the others * * * until we get them all". Similarly, Graveley abandoned his business when Stark, Besser's patent counsel, threatened to "sue me [Graveley] and keep me tied up for a long period of time if I made an automatic block machine, whether or not infringement was involved", and reminded Graveley that he could not afford to be tied up in this way "win, lose or draw".[30] On another occasion Stark, having merely passed by Winn's machine, told Winn he was infringing and that on his return in two weeks he "expected to find our plant closed down".

This demand that a competitor close his plant, this plan to "go after" competitors until "we get them all", cannot be justified on any theory that the defendants' patents, if valid, dominated the field. As the Sixth Circuit stated in *Whitman* v. *Andrus*, 92 U. S. P. Q. 291, 293, "Gelbman was not, nor did he claim to be, an innovator in the use of vibration to compact concrete material in a

[30] Stark intimated to another competitor, Lith-I-Bar, that the expenses of an infringement suit might be as much as $200,000.

mold." Indeed appellants admit (Br. 10) that "it is certain that both vibrating and tamping machines of all established capacities can be and are being manufactured and sold without infringement of the Gelbman-Andrus or the Besser patents". The most that the defendants are entitled to do was to demand that competitors not infringe. To use patents as a means of forcing competitors out whether or not they were infringing by emphasizing that the little fellow could not stand the expense of suit, "win, lose or draw", clearly exceeds the patent grant.

It should be noted that at the time of these statements and acts the alleged infringers had good reason to be optimistic about their legal chances of success. Not only was it possible to make vibrating and tamping machines without infringing, but there was good reason to believe the patents invalid. In the *Bell* suit (defended by Besser), a district court had held two claims of one of the Gelbman patents invalid. Recently the Sixth Circuit has held two of the Gelbman patents invalid. *Whitman* v. *Andrus*, 92 U. S. P. Q. 296. Both Darden and Graveley felt confident of their legal position but bowed to superior financial power. Both the success and the vice of the defendants' activities may be measured by the fact that several competitors capitulated following threat of suit, while only one, Lith-I-Bar, the third largest in the industry, resisted; yet when the de-

fendants sued Lith-I-Bar it secured an adjudication of invalidity of the two Gelbman patents involved.

To such a situation, Judge Frank's observation in *Picard* v. *United Aircraft Co.*, 128 F. 2d 632, 641–642 (C. A. 2), is most appropriate:

> * * * most patents escape judicial scrutiny, since few patents ever get into court. For the expense of defending a patent suit is often staggering to the small businessman. And there is reason to believe that, unable, for that reason, to defend a threatened patent suit, many persons capitulate to a well financed patentee without litigating; the result is that many patents, which are "spurious"—i. e., would probably not stand up in court, if contested—confer, in actual fact, patent monopolies which are as effective, for all practical purposes, as if they had been judicially held valid. The actual enjoyment of a patent monopoly—which, of course, has its effect on the public—may, it seems, often depend on the fact that the patent is owned by a wealthy concern and that alleged infringers lack funds to defend themselves.

Threats by dominant producers of infringement suits to harass competitors are a familiar part of the pattern of monopoly cases under the Sherman Act. E. g., *Patterson* v. *United States*, 222 Fed. 599 (C. A. 6), certiorari denied, 238 U. S. 635; *Stewart-Warner Corporation* v. *Staley*, 42 F. Supp. 140 (W. D. Pa.). Harassment of competi-

tors by patent litigation as a part of a monopolistic program was condemned in *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N. D. Ohio), affirmed, 323 U. S. 386. Judge Kloeb said (p. 565):

> Another part of the plan was a system of litigation against all remaining outsiders. Here the power of litigation pursued by a strong combination of two companies, * * * backed by unlimited financial means, is brought into play against individual companies, most of them small manufacturers of glass products.

The record here amply justified the holding that Besser alone and Besser, Stearns and Gelbman in combination engaged in a similar program of unlawful harassment.

III

THE RELIEF ORDERED BY THE DISTRICT COURT IS APPROPRIATE AND NECESSARY

As we have seen, the district court rightly concluded that appellants have attempted to monopolize and monopolized trade and commerce in block machines, and combined and conspired with the other defendants to restrain such trade. Accordingly, the United States is entitled to a judgment dispersing appellants' monopoly power, *Schine Chain Theatres* v. *United States*, 334 U. S.

110, 128, 129, depriving appellants of the fruits or benefits of their monopolistic practices and trade restraints, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189, and terminating the combination and conspiracy. In addition, the judgment should "forbid the doing in the future of acts like those * * * found to have been done in the past which would be violative of the statute." *United States* v. *Standard Oil Co.*, 221 U. S. 1, 78. "[R]elief, to be effective, must go beyond the narrow limits of the proven violation," *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 90; "* * * the usual ways to the prohibited goal may be blocked against the proven transgressor * * *" *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

In its major outlines, the judgment entered below (R. 1063–9) gives three types of relief. (1) It breaks up appellants' monopoly power by requiring divestiture of the Stearns stock and by prohibiting future acquisitions of stock or assets save on a showing that competition will not thereby be lessened (Secs. IV and V). (2) It deprives Besser of one of the fruits of its monopoly power by requiring that existing lessees of its block machines be given an option to purchase such machines and necessary accessory equipment (Sec. VIII). (3) It prevents unlawful use of patents by invalidating the three-party agreement of 1942, enjoining the execution of similar agreements in the future, and

requiring licensing of existing and future patents at fair royalties (Secs. VI and VII).[51]

We believe that such relief is the minimum necessary to "cure the ill effects of the illegal conduct" which has been found and to "assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. The district court had the "opportunity to know the record and to appraise the need for prohibitions or affirmative actions" (*id.*, 89). The judgment which it entered provides relief of a kind awarded in many other cases involving like violations of the statute and clearly is not an abuse of the discretion vested in the trial court with respect to appropriate remedy. Moreover, appellants' activities since the filing of the complaint (*supra*, pp. 26–31) demonstrate their disregard for the Sherman Act and point up the need for a decree which will assure future conformance with the Act.

Appellants do not object to many provisions of the judgment, and object only in detail or phraseology to others. We shall discuss below the provisions concerning which appellants' brief raises any question.

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[51] In addition, the judgment enjoins certain other types of conduct (Secs. IX and X), contains the usual visitorial provision (Sec. XI), the usual provision retaining jurisdiction (Sec. XII), and a provision (Sec. III) making the judgment binding on successors and assigns.

A. DIVESTITURE OF STOCK AND PROHIBITION AGAINST FUTURE ACQUISITIONS

Appellants do not object to the substance of the provisions (Secs. IV and V) requiring divestiture of the Stearns stock and prohibiting subsequent like acquisitions (App. Br. 85, 102). Plainly the United States was entitled to an order of divestiture. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 97); *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. And, to prevent future violations, appropriate protection against subsequent acquisitions and against interlocking directorates was equally necessary. *United States* v. *Crescent Amusement Co., supra.*

Appellants contend, however, that the time allowed them to accomplish the divestiture was too short. And they invite this Court to "outline procedures, including trusteeing" (Br. 102), which they seemingly suggest would be preferable to an outright sale of the Stearns stock held by them. If appellants are now seriously seeking a trusteeing of the stock, we are firmly opposed. The situation presented by this case is one which calls for outright divestiture, by sale, as promptly as is reasonably possible.

1. The execution of the Stone contract, by which Besser sought to "superficially cleanse itself of all taint of monopoly while retaining all its benefits" (R. 1027) demonstrates Besser's continuing determination to relegate Stearns to the position

of a second rate competitor despite the pendency of this suit. Nothing short of a complete severance of Besser's connection with the stock will provide absolute and final assurance against future efforts to accomplish the same results.

2. As Besser has already held a controlling stock interest in Stearns for approximately four years, it is imperative that Stearns' restoration to a full competitive position with Besser be achieved as rapidly as possible. A trusteeing of the stock would simply create a further period of uncertainty which would adversely affect Stearns' ability to compete in at least two major respects.

(a) Block makers are wary of purchasing an "orphan piece of equipment" (R. 547)—i. e., a block machine made by a manufacturer who may not be available to supply necessary replacement parts and servicing for the life of the machine. Any doubt as to the continued existence of the seller is an obvious handicap to the sale of the machine. We think Stearns is suffering from that handicap now and will continue to do so for so long as the ownership of controlling interest in it remains unsettled. The industry is well aware that Besser has already made a contract (now cancelled by court order) with Stone, whose avowed purpose was "to sell off the physical plant at Stearns" (R. 674) and direct Stearns' assets and energies to making Aglite equipment (R. 671). This alone suggests the possible termination

of Stearns' activities as a block machine manufacturer. If Stearns is to be restored to the position of a full-fledged competitor to Besser all such handicaps must be removed. This can only be accomplished by a complete and final severance of all Besser's connections with Stearns.

(b) Stearns' vigor and future success will depend largely upon its management. It is important that the new owners of the controlling shares install officers of their choosing as soon as possible so that they can adopt immediate and long range policies. A trusteeing of the stock would simply delay the day when the new owners would begin operating the company.

The district court was well aware of the foregoing considerations and set a limited time (60 days for the submission of a plan and 78 days for completing divestiture) to spur appellants into acting promptly. Until they have made a bona fide effort to comply, no one can say with absolute assurance that the period of 78 days is or is not an adequate time for the disposal of the stock, which is all that is involved. There is reason to believe the time would have been adequate. The stock is not lacking in attractiveness, as is indicated by the efforts of the Stearns minority stockholders (Tr. 2373–5) and Stone (Tr. 2469) at the hearing on relief to secure an inside track to the purchase of it.[52]

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[52] While invalidating the Stone contracts, the court (Tr. 2467) did not bar Stone as a potential purchaser of the stock

If, after a bona fide effort to comply, it should appear that more time is necessary the United States would not object to a reasonable extension of time, and it so stated in the court below (R. 1040). Until an effort is made to comply promptly, appellants' objection would seem to be premature. In any event, since these provisions of the decree were stayed and the date specified for completing divestiture has expired it will be necessary for the district court, on remand, to set new dates for the submission of a plan and completion of divestiture.

B. PROVISION GRANTING BESSER'S PRESENT LESSEES THE OPTION TO PURCHASE LEASED MACHINES

Appellants (Br. 94) ask this Court to strike from the judgment Section VIII (A), which gives to Besser's *existing* lessees the option (1) to terminate the lease, (2) to continue it, or (3) to purchase the leased machine or machines on terms "mutually satisfactory to the parties concerned" (R. 1068). The Government submits

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but made it clear that it would examine any agreements between Besser and Stone with a "fine tooth comb" (Tr. 2468). Stone argued that the public interest and that of the industry would be better served if Stone were permitted to acquire the stock rather than the Stearns minority stockholders (Tr. 2469). The United States expresses no opinion on whether either the Stearns minority stockholders or Stone could qualify as purchasers. But their indication of a strong desire to buy emphasizes the attractiveness of the stock.

that this section of the judgment should be upheld.

In October 1947 Besser adopted the policy, which it has subsequently unwaveringly followed, of making their most advanced machine, the V-3-R (Super Vibrapac), available to block makers in the United States only under lease (R. 947).[53] The policy provoked immediate resistance. In October 1946 Longenecker, president of a block-making company in Pennsylvania (R. 449–50), had placed a purchase order for one of Besser's Super Vibrapac machines and had made a down payment of $3,500 (Exs. 148–151, R. 1360–4). Besser delayed making delivery, and in October 1947 informed the purchaser that it had changed its policy and was now leasing this machine only, and therefore would not fill the purchase order (R. 452–4). Although Longenecker wished to purchase and not lease (R. 453), he accepted a lease as "the best course possible * * * to follow" under the circumstances (R. 455).[54] See also R. 1043, 1047.

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[53] On foreign orders, the machine is sold and not leased (R. 948).

[54] Since he had put in a purchase order before the leasing policy was determined and since he was the first Besser customer to enter into the lease agreement, he was given the privilege of buying the leased machine in the event that Besser later changed its policy and again offered its machines for sale (Ex. 153, R. 1369–70).

As we have stated, the leasing policy was adopted in October, 1947. Besser, having already acquired some 14,000 shares of Stearns, was at about this time laying plans for the secret acquisition of clear control of Stearns, which it completed by March, 1948 (*supra*, pp. 24-25). Besser alone had 47.8% of the industry's dollar sales in 1947 (App. Br. 57). Together with Stearns it had 67.2% of such sales in 1947 and 65% in 1948 (R. 1013). But these percentages fail to represent the complete monopoly which Besser had of a machine making 750 blocks per hour, the capacity of Besser's Super Vibrapac machine (App. Br. 38, 39). At the time of trial no other manufacturer had a machine with a rated hourly capacity even approaching this (Ex. 190, R. 1408-12). Lith-I-Bar's machine had a rated capacity of 480 per hour (R. 383) and Appley's machine a capacity of 100-120 per hour (Ex. 190, R. 1408). Manufacture of the Warren machine, having a capacity of 800 per hour, had been brought to an end by instituting an infringement suit which had been settled because the suit had cut off supplies and because the defendants were unable to finance extended patent litigation (*supra*, p. 18). No 750 block-per-hour machine was available from companies other than Besser until Gocorp produced a high speed machine in the early part of 1949 (Tr. 2366). Consequently a block maker who desired a high production machine had no alternative but to accept the Besser

machine on whatever terms Besser chose to lease it.

The costs of any block maker who uses the Super Vibrapac machine to capacity or near capacity are very much greater if he rents rather than purchases. The rental is one cent for each block produced up to 1,500,000 in one year, which figure is below the year's output if the machine is operated only eight hours per day for only a 5-day week.[55] The yearly rental, assuming such production of 1,500,000 blocks, is $15,000. The machine has a 10-year life (R. 950), so that a lessee, if he is to get production equal to that of the machine in the hands of a purchaser, must lease the machine for ten years and pay $150,000 as rental. Besser's president testified that the sales price of the machine if it had been sold would have been $40,000 (R. 754–5). In other words, production of 1,500,000 blocks annually—a conservative estimate of yearly production—would cost the block maker almost four times as much under appellants' lease agreement as it would if the machine were purchased.

Appellants seem to suggest (Br. 90) that the leasing is advantageous to Besser's customers. We have no doubt that some customers, given a choice between purchase and lease, would have chosen to lease, notwithstanding the onerous

[55] 750 blocks per hour, 8 hours per day, 5 days per week, 52 weeks per year = 1,560,000.

terms of the lease. The point is that no choice was given, or rather, that the only choice was between leasing and doing without the most efficient machine on the market.

Appellants also suggest (Br. 90) that the judgment interferes with "adapting distribution to the customer's needs" and that it strikes down leases which "provide a local operator, with limited capital, access to a more efficient machine with a minimum investment, thus permitting him to compete more successfully in his local market." Obviously the judgment has no such effect. Only in the instances in which the lease does not best serve the customer's needs will he avail himself of the option to purchase provided by Section VIII (A).

The option which the judgment gives restores the lessees to the bargaining position which they would have had absent Besser's violations of the Sherman Act. It is a purpose of the Sherman Act to secure equality of opportunity and to preserve for all freedom to deal in a competitive market, whether as buyers or sellers. *Ramsay Co.* v. *Bill Posters Association*, 260 U. S. 501, 512; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493; *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464. Relief is fashioned to achieve this end. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 88–89.

The relief awarded is narrower than that sustained in *International Salt Co.* v. *United States*, 332 U. S. 392. The defendant there had distributed its machines primarily by leases and had in some cases refused to sell its machines outright (6 F. R. D. 302, 306). Paragraph VI of the decree, which the Court sustained, required International Salt "to offer to lease or sell or license" its present type of machine or other types which might be developed, and provided: "Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph." 332 U. S. 392, 399, n. 7. Thus that judgment not only gave existing lessees an option to buy, but also required the defendant to continue forever to offer its machines for sale.

Nothing in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, requires a different result. In that case this Court was primarily concerned with the effect of the decree in prohibiting future leasing at a time when the defendants were no longer participating in any conspiracy or other violation of the Sherman Act (323 U. S. at 414). The Court also invalidated, without discussion, a provision terminating existing leases (p. 422). The provisions there involved, terminating all existing

leases and prohibiting future leasing, were far less moderate than the present provisions, which merely give existing lessees an option to purchase. Particularly in view of the subsequent decision in *International Salt*, this Court's decision with respect to the provision before it in *Hartford-Empire*, concurred in by only four Justices (see 323 U. S. at 436, 449–450) is not to be taken as a declaration of a rule of law that under no circumstances can existing leases be made terminable.[56]

Section VIII of the present judgment leaves the appellants free to adopt a leasing system for the future if they so desire and if they are able to find lessees. But as a matter of elementary justice, any present lessee who was forced against his wishes to take the lease in lieu of purchasing machinery, should be given a reasonable opportunity to free himself from the onerous terms which Besser was able to impose on him through the exercise of monopoly power. Besser should not be permitted to avoid this requirement on the basis of asserted hardship or inconvenience. As this Court has said, "those who violate the Act may not reap the benefits of their violations and

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[56] Compare *United States* v. *National Lead Co.*, 332 U. S. 319, 358, stating that "it cannot be assumed that, by [the deletion of paragraph 24 (c) of the *Hartford-Empire* decree, the Court] announced its disapproval, in all future decrees, of provisions requiring the supplying of technical information to licensees at a reasonable charge."

avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

C. PATENT PROVISIONS

1. *Cancellation of the 1942 license agreement and prohibition of similar agreements.*—After cancelling [57] the three-party agreement of December 7, 1942 (Sec. VI (A), R. 1065) the judgment provides:

> (B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942.

This provision must be interpreted in light of the court's statement (R. 1021):

> It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents.

[57] In view of the illegality of the 1942 agreement, discussed *supra*, pp. 42–53, the lower court was justified in ordering its cancellation. Cf. Sections IV and V of Judgment entered in *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 99.

As Section VI (B) is directed to preventing a revival or repetition of the vice found to exist in the 1942 agreement, we do not construe it as barring the granting or receiving of a bare exclusive license. Since, however, Besser seems to find it ambiguous and since it is susceptible of a possible construction beyond that intended, we do not object to a clarification of it in the following manner: strike the words "or licensees control" from the fifth line (as printed *supra* p. 71) and substitute therefor the words "joint control with any other licensee or licensees." As thus amended, we think it will be clear that the purpose of the provision is to preclude any arrangement by which patent licensees, acting jointly, may control the granting or denial of other licenses.

Contrary to the claim made by appellants (Br. 104), the injunction against granting or conveying patent rights under any agreement "which has the same unlawful purpose and effect as the aforedescribed license agreement of December 7, 1942" (R. 1066) is not subject to the same infirmity as was the provision stricken in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 410. That provision enjoined appellants from violation of the antitrust laws "as charged in the complaint." Similar in scope to the provision under consideration is the injunction approved in *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 187. In the *Crescent* case this Court

considered an injunction prohibiting exhibitors from making franchises with certain distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them", and from entering into "any similar combination and conspiracy for similar purposes and objectives." The injunction approved in the *Crescent* case necessarily requires reference back to the Court's opinion in order to ascertain what constitutes defendant's theatre monopolies. The provision here, which refers to but one contract and its operation, is sufficiently definite to inform Besser as to the area of forbidden activity.

2. *Compulsory Licensing of Patents.*—Section VII (R. 1066–7) orders appellants and Gelbman and Andrus to grant to any applicant a non-exclusive license at a fair royalty rate under any, some or all of the patents and applications pertaining to block machinery now owned or controlled by them or which are applied for or issued within 10 years from the date of entry of the judgment. As Besser has shown a propensity for misusing patent rights, *supra*, pp. 42–53, any judgment here would fall far short of its purpose if it failed to require such licensing.

This Court has sustained compulsory licensing in every case coming before it in which the district court has ordered that remedy. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *United States*

v. *National Lead Co.*, 332 U. S. 319; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 340 U. S. 76. Contrary to appellants' suggestion (Br. 95–97), the remedy is not limited to "flagrant" cases. As this Court said in *United States* v. *National Lead Co.*, 332 U. S. 319, 357, of a related provision requiring exchange of technical information:

> The fact that the violations of the Antitrust Act may have been more reprehensible in [the *Hartford-Empire* case] than here is not persuasive because this provision is not and should not be punitive. The justification for the compulsory imparting of methods and processes rests upon its appropriateness and upon the necessity for it in providing an effective decree.

In any event, appellants' violations of the antitrust laws were deliberate and flagrant.

Appellants attack upon the compulsory license remedy amounts to a claim that they should not now be disarmed of the weapon they fashioned out of patents. Even after divestiture of the Stearns stock, Besser will still be by far the largest manufacturer in the industry and will still have an especially dominant position in respect of the most advanced and efficient machines. In view of Besser's unlawful use of patents, through combination with Stearns to deny licenses and through harassing use of infringement actions, the judgment here would fall far short of

its purpose if it failed to disarm Besser of the patent weapon until the effects of its oppressive tactics have been dissipated. The appropriateness of compulsory licensing is especially apparent from the attitude evidenced by representatives of prospective licensees during the proceedings on royalty determination. They there clearly indicated that their desire was not so much to use the technology embodied in Besser's patents, as to obtain freedom for themselves and their customers from any threat of infringement litigation. As Olsen stated, the license being sought "gives the licensee nothing except assurance that he will not be attacked by Besser" (R. 1105).

The determination of the period of time during which future inventions should be subject to the licensing requirement was within the discretion of the trial court. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 94. The ten-year period which it adopted is not excessive when viewed in the light of the periods fixed in other cases. Thus, in the *Hartford-Empire* case, this Court approved a requirement of compulsory licensing of future patents without limitation as to time. 323 U. S. at 413, 417. In the *Gypsum* case this Court also directed the licensing of future patents and stated

> Whether the term for compulsory licensing of new patents is to be five years, or for a longer period with the privilege to the appellees to move for a limitation for such

> new patents, as provided in the [decree proposed by the Government] we leave to the District Court [340 U. S. at 94].

In the *National Lead* case the period adopted by the district court and approved by this Court was five years.

Appellants complain of discrimination in that the decree fails to direct Stearns to license its patents. Insofar as the record in this case shows, Stearns had no patents relating to block machines other than those transferred to Gelbman and Andrus (R. 352–3; Ex. 10, R. 1202; Ex. 112, R. 1323; R. 95–7). Since the latter are required (R. 1066) to license these patents, all known existing patentable inventions of Stearns are being made available to any manufacturer, including Besser Company. In view of the possibility, however, that Stearns may in the future acquire patent rights we believe that the decree should have required licensing of Stearns' patents on the same terms as Besser's. While we do not believe that it would be appropriate for this Court to remedy the inadvertent omission of Stearns from the licensing provisions, since Stearns is not a party to this appeal, we intend, on remand, to apply to the district court for such relief. Furthermore, appellants clearly cannot object to lawful relief awarded against them because of the failure to award like relief against some one else.

3. *The Licensing Procedure.*—The mechanism established by the district court for determining the rate of royalties and form of license agreement is in substance that urged upon the court by counsel for Gelbman and Andrus. These two defendants, who had at least 11 existing patents (R. 1072–3) subject to compulsory licensing (as compared with three held by Besser, *infra*, p. 79), sought to have the form of the license and rate of royalty determined at one time and submitted to the court for its approval (Tr. 2389, 2405, 2412).

Under the procedure adopted, the Government and Gelbman and Andrus were each to select two persons to act as a committee to determine fair royalty prices and the form and contents of the royalty contracts for the Gelbman and Andrus patents; if they could not agree they were to select a fifth, and if they were unable to agree on a fifth member the court could either act as the fifth member or select another person in his stead (Sec. VII (B) 1). The same procedure was to be followed as to the Besser patents, with Besser selecting two of the members of the committee (Sec. VII (B) 2).

This procedure has worked satisfactorily as to the Gelbman and Andrus patents. The Government and Gelbman have each appointed two representatives who, sitting as a committee, agreed upon and filed with the court (R. 1072)

a form of license and a schedule of royalties for those patents.[58] Besser, however, ignored the requirement that it appoint its representatives by April 21, 1951, the date specified in the judgment. It made no effort to comply until May 9, 1951 (R. 1086), after the trial court had temporarily denied its request for a stay pending the appeal, and again directed (R. 1082) it to comply with Section VII of the judgment.[59] Thus,

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[58] In choosing its representatives, the Government further sought to carry out the original idea proposed by counsel for Gelbman and Andrus by selecting persons in the industry who would represent the interests of prospective licensees. After a poll of a representative number of prospective licensees, the Government designated Olsen and Darden to sit on the committee, and advised the court that these two designees would serve on the committee on their own behalf and as agents of other prospective licensees and not as agents of the Department of Justice (R. 1070). The Government gave no advice or instruction whatever to Olsen and Darden (R. 1137, 1141, 1146).

[59] The trial court had made it clear that compliance with Section VII (B) 2 to the extent of determining the rate of royalty and form of license would be without prejudice to appellants' right of appeal (R. 1087, 1098).

The Orders of Stay granted by Mr. Justice Reed similarly were designed not to delay the creation and operation of the committees. The first order, dated May 11, 1951, was by its terms inapplicable to Section VII (B) 1 and 2 (calling for creation of the committees and determination of licensing terms); it granted a 30-day stay "for the purpose of allowing the completion of the proceedings as directed by Par. VII (C)", for the inclusion of licensing terms in the judgment. The second order (R. 1176), issued after completion of those proceedings, stayed the actual issuance of licenses pending determination of the appeal.

Besser's present claim (Br. 108) that it did not get an adequate opportunity to present evidence supporting its request for a higher royalty than that actually set, if in fact true, is in part, at least, the result of its own lack of diligence.

Three of Besser's patents were before the committee. An agreement was reached as to one (R. 1090). Another (Scott) has now been declared invalid.[60] *Besser Manufacturing Company* v. *Whitman*, 92 U. S. P. Q. 291 (C. A. 6). Thus there is only one Besser patent (Wellnitz) as to which any issue of royalty rate is presently alive. After receiving and considering information presented by appellants' representative (R. 1097–1111) as to the value of the Wellnitz patent, the court fixed (R. 1111) the royalty at $25 per 8-inch compartment ($75 per three-at-a-time machine), which was only $25 per machine less than the royalty previously charged for an exclusive license (R. 1104). This was one of the patents to which Olsen was referring in stating that all the prospective licensees were interested in was freedom from threats of infringement suit for themselves and their future customers (*supra* p. 75).

It is clear that the district court had discretion to adopt whatever reasonable licensing procedure seemed appropriate to it. *United States* v. *United*

[60] The district court was familiar, prior to the committee meeting, with the nature and scope of the Scott patent as a result of the *Andrus* v. *Whitman* litigation, *supra*, p. 54.

States Gypsum Co., 340 U. S. 76, 94. If, however, this Court should feel, in the light of the experience with the district court's licensing procedure as applied to the Besser patents, that some other procedure would be more appropriate, we respectfully suggest that the Court consider the procedure which the government has consistently urged for adoption in this case. (See Government's proposed decree (R. 1034, 1056). This procedure is identical in substance with that approved by this Court in *Gypsum* and included in many antitrust judgments.[61] Under the Government's proposal Besser would be compelled to grant nonexclusive licenses free of restrictions except those specifically permitted by the judgment; the rate of royalty would be determined in private negotiations[62] between the patent owners and the

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[61] At least twenty-five consent judgments contain this type of procedure. Included are: *United States* v. *Libbey-Owens-Ford Glass Co.* (N. D. Ohio, 1948), CCH Trade Reg. Service, Par. 62323; *United States* v. *Owens-Corning Fiberglas Corp.* (N. D. Ohio, 1949) *id.* Par. 62442; *United States* v. *Automatic Sprinkler Co.* (N. D. Ill. 1948) *id.* Par. 62230; *United States* v. *Gamewell Co.* (D. Mass. 1948), *id.* Par. 62286; *United States* v. *American Optical Co.* (S. D. N. Y., 1948), *id.* Par. 62308; *United States* v. *General Cable Corp.* (S. D. N. Y., 1948), *id.* Par. 62300; *United States* v. *Technicolor, Inc.* (S. D. Calif., 1950), *id.* Par. 62586.

[62] This procedure has two distinct advantages over the machinery established by Judge Picard: (1) the objective of compulsory licensing would be attained with a minimum of interference to the normal business relationship between a licensor and licensees, and (2) in the absence of a controversy

prospective licensee; and in the event of a failure to agree upon a satisfactory rate of royalty the matter would be determined by the Court.

The adoption of the suggested machinery at this time would, in effect, nullify some of the work already performed by the "committees". Since, however, two of the Gelbman patents and Besser's Scott patent were largely, if not entirely, invalidated by the recent decision of the Sixth Circuit it will be necessary in any event for the "committees" to completely re-examine and readjust the rates of royalties already fixed.[63] In short, we think the procedure proposed by the Government will, in the long run, prove less burdensome on the district court and generally more workable than the procedure now set up in the judgment. For one thing, it would eliminate the necessity of re-establishing the committee each time new patents subject to compulsory licensing are acquired in the future, or existing patents expire or are held invalid.[64]

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as to the rate of royalty the court would be relieved of the burden of determining or reviewing any rates of royalty.

[63] A package royalty rate for the use of nine of Gelbman's patents has been fixed (R. 1072).

[64] Since Gelbman and Andrus have not appealed and are not before this Court, we recognize that this Court may not wish to make any modification of the decree as it affects them. If, however, this Court should direct that the licensing procedure applicable to appellants' patents be changed, the district court would, presumably, not wish to have two different procedures applicable under the same decree.

D. MISCELLANEOUS PROVISIONS

1. *Application of the judgment to "successors" and "assigns."*—Appellants attack (Br. 101) Section III (R. 1064), which makes the provisions of the judgment applicable to "successors" and "assigns", thus giving it a broader application than that provided by Rule 65 (d) of the Federal Rules of Civil Procedure.

As this Court pointed out in *Regal Knitwear Co.* v. *Labor Board*, 324 U. S. 9, 12, a formula including the words "successors" and "assigns" has been used in several antitrust judgments.[65] We do not, therefore, understand that Rule 65 (d) forbids the use of those words where, as here, they are necessary to insure compliance with affirmative provisions of the judgment. Besser could, for example, assign the present leases to a third party who would not, in the absence of this provision, be bound to carry out the provision (Sec. VIII, R. 1068) requiring Besser to give the lessees the option to purchase. It is also possible that the same result might be accomplished by a sale of the assets, including the leased machines, of the Besser Manufacturing Company so that the buyer could escape compliance with Section VII unless the

[65] See decrees in *United States* v. *Pullman Co.*, Civil Action No. 994, E. D. Pa. 1944; *United States* v. *Vehicular Parking, Ltd.*, Civil Action No. 259, D. Del. 1944; *United States* v. *Great Lakes Towing Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 253–54 (N. D. Ohio, 1915); all cited at 324 U. S. p. 12, n. 5.

judgment is binding on "successors." If, following compliance with the affirmative provisions of the judgment, appellants find that this provision "clouds" their right to dispose of their property, they may follow the course suggested by the *Regal* case (*id.*, 15) and petition for a modification or construction of this provision under Section XII (R. 1069).

2. *Prohibition Against Contracts Restraining Others From Competing.*—Appellants' proposed substitute (Br., 106) for Section IX (R. 1068) is unacceptable to the government for the following reasons:

(a) Appellants have utilized restrictive agreements as a part of their program to monopolize. By the 1938 agreement (Ex. 9, R. 1192) territories were illegally allocated[66] between Besser and Stephen Flam. In the contract of purchase of Stephen Flam, Inc. (Ex. 28, III, R. 1240) the seller agreed that it would not engage in the concrete block machinery business in the state of California so long as Besser carries on a like business

[66] Agreements which limit the area of competition between competitors or divide the fields in which they may do business have long been condemned as violative of the Sherman Act. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 802–803. The validity of the Flam agreement is not saved by the presence of patents as the agreement shows on its face (Par. 1, R. 1194) that the division of territories applied to machinery and devices not covered by the licensed patents.

in that state (Ex. 28, R. 1240). These agreements and others like them demonstrate Besser's propensities for using "ancillary" contracts for an illegal purpose which Section IX is designed to prohibit.

(b) Although the district court has already examined these restrictive contracts (R. 1019, 1023) and ordered the cancellation of any such agreement outstanding on the entry of the judgment, Besser now proposes (Brief, 106—proposed Section IX (A)) a procedure which would permit a reexamination of some or all of the same agreements. As this could lead to a retrial of some of the same issues already adjudicated, we see no justification for the substitute provision.

In *United States* v. *National Lead Co.*, 332 U. S. 319, 363, this Court said in response to National Lead's argument that one of the injunctive provisions there involved imposed an unjustified restriction on its power to contract:

> If National Lead later can demonstrate that its right of contract has been unduly restricted, it may, under the terms of the decree, apply to the District Court for a modification of the judgment.

The same statement is equally applicable here.

3. *Absence of Any Adjudication of Validity.*—Section VII (D) of the judgment provides that nothing in the judgment shall prevent any applicant from attacking, in the royalty determina-

tion proceeding, the validity or scope of any of the patents required to be licensed and states that the judgment shall not be construed as imparting any validity or value to any of the patents. This provision merely states what would be the effect of the judgment in any event. The district court believed, however, that this provision was particularly necessary here to avoid any confusion which might arise in the minds of prospective licensees as to their rights in the royalty determination hearing. This confusion could very easily arise due to the fact that the same court had also handled the patent infringement litigation (*Andras* v. *Whitman, supra*) involving an attack on the validity of some of the same patents which were subjected to compulsory licensing. In these circumstances the provision is simply a recognition of the dubious validity of at least three of the patents subject to compulsory licensing, important claims of which, although held valid by the district court, have now been invalidated by the Court of Appeals (*Whitman* v. *Andrus, supra*).

The provision differs markedly from that which this Court refused, in *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 94, to add to the decree, in that it is limited to the right of a license applicant to attack validity in the royalty determination proceeding under the decree, while the proposed provision in *Gypsum* would have ap-

plied to "this" proceeding or "any other proceeding" (340 U. S. at 103). The present provision thus relates to a matter peculiarly within the court's control. Moreover, since an applicant in such a proceeding is not yet a licensee, the provision does not touch on the scope of a licensee's estoppel to attack the validity of the licensed patent, the point with which the decisions cited by this Court at footnote 15 of the *Gypsum* opinion were concerned. In the light of the special circumstances mentioned above, we submit that adoption of this provision was not an abuse of the district court's discretion.

CONCLUSION

For the foregoing reasons the judgment of the district court (with the minor modifications noted herein) should be affirmed.

Respectfully submitted.

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